

JUDGE KOELTL

18 CV 00701

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

18 Civ. ()

Plaintiff,

- against -

ECF CASE

ONE OR MORE UNKNOWN TRADERS IN THE
SECURITIES OF BIOVERATIV, INC.,

Defendants.

**DECLARATION OF MICHAEL D. HOKE IN SUPPORT OF
PLAINTIFF'S *EX PARTE* EMERGENCY APPLICATION FOR AN
ORDER TO SHOW CAUSE, ASSET FREEZE, AND OTHER RELIEF**

I, Michael D. Hoke, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I submit this declaration in support of Plaintiff's *Ex Parte* Emergency Application for an Order to Show Cause, for an Asset Freeze, and Other Relief.
2. I am over 18 years of age, am employed as an attorney in the Division of Enforcement of the United States Securities and Exchange Commission ("Commission"), and have been a member of the Commission's staff since January 11, 2016.
3. Along with other members of the Commission's Division of Enforcement staff, I have been investigating possible violations of the federal securities laws with respect to trading in options on common shares of Bioverativ, Inc. ("Bioverativ" or "BIVV"). Based on the investigation, which is ongoing, I am setting forth the facts herein based on information learned from others and obtained from reviewing publicly-available information and records obtained during the investigation.

Understanding Options Trading

4. I reviewed prior Commission actions describing options trading and also have personal knowledge of the mechanics of trading options based on my investigation of this case and work on other matters.

5. A “stock option” or “option” is a financial contract between two parties in which the buyer purchases the right, but not the obligation, to buy/sell shares of an underlying stock at a predetermined price from/to the seller within a specified time period. Each stock option confers the right to buy or sell 100 shares of stock. The predetermined price agreed to by the parties to the contract is referred to as the “strike price,” and the specified time period for the options contract is stated in terms of an “expiration date.”

6. To “exercise” an option is to execute the right of the buyer to either buy or sell the underlying stock at the strike price. Options can generally be exercised at any time prior to the expiration date.

7. A “call” option is a financial contract between two parties that gives the buyer the right, but not the obligation, to buy an agreed quantity of stock during a specified time period at a specified price. A buyer of a call option pays a price, known as a “premium,” to purchase this right and generally stands to gain if the stock price rises. The premium is usually quoted per share, and most option contracts represent a commitment of one hundred shares. Thus, the total amount paid by a purchaser per option contract is one hundred times the quoted premium.

8. An option is “out-of-the-money” when the difference between the strike price of the option and the current market price of the underlying stock make it economically unfeasible to exercise the option. For example, a call option is out-of-the-money when the strike price is higher than the market price of the underlying stock,

meaning that one could purchase the stock in the market at a lower price than what one would pay by exercising the option.

9. The following hypothetical is an illustration of how options are commonly quoted and how a basic call option operates.

10. A call option in Apple Inc. (AAPL) stock with an expiration date of January 26, 2018, with a strike price of \$185 is typically quoted in a format such as:

AAPL180126C00185000 or AAPL 26JAN18 185.00 C or
AAPL 185.00 JAN 18 WK4 C.

A 26JAN18 185.00 C option gives the purchaser of the call option the right to buy 100 shares of AAPL on or before January 26, 2018, for \$185 per share.

11. Assuming that the price of AAPL is currently \$177, the buyer is betting that the price will go up. These hypothetical options are called out-of-the-money because if the stock does not reach \$185, and thus is not in-the-money, by January 26, 2018, the buyer will lose the money he or she paid for the option contract (unless the contract is resold first).

12. The closer in time the expiration date of an out-of-the-money call option, and the further the option is out-of-the-money, the risk is greater that the option will lose value and, if not sold, expire valueless.

13. The price that the buyer pays for the option contract is quoted per share, but because options are denominated in 100 shares, the price is multiplied by 100. Accordingly, in this example, if the price for one 26JAN18 185.00 C option contract was \$1, then it would cost \$100 to purchase one call option contract.

14. Call options allow traders to leverage their bets beyond what they would be able to achieve with the same amount of invested capital if they were to instead

purchase the actual shares in a long position. This is because a call option buyer avoids the outlay of capital to purchase the shares themselves, but is still able to participate in the profits from an upward movement in price.

The Merger Announcement

15. Bioverativ is a Delaware corporation with principal executive offices in Waltham, Massachusetts, the common shares of which are listed on the NASDAQ exchange under the ticker “BIVV.” Bioverativ bills itself as a global biopharmaceutical company specializing in the research, development, and commercialization of innovative therapies related to hemophilia and other rare blood disorders.

16. Before the U.S. markets opened on Monday, January 22, 2018, Bioverativ and French *société anonyme* Sanofi (“Sanofi”), a global life sciences company, publicly announced an agreement for Sanofi to acquire all of the outstanding shares of Bioverativ through a tender offer for approximately \$11.6 billion (the “Announcement”). Attached hereto as **Exhibit 1** is a true and correct copy of the joint press release, which I downloaded from Bioverativ’s website. Attached hereto as **Exhibit 2** is the Schedule TO (Tender Offer Statement) Sanofi filed with the Commission on January 22, 2018, which I downloaded from Bioverativ’s website.

17. Under the terms of the agreement, Sanofi would pay \$105 per share in cash, a premium of 63.8% over Bioverativ’s Friday, January 19, 2018 closing price of \$64.11 per share. Attached hereto as **Exhibit 3** is a screenshot from MarketWatch.com showing the January 19, 2018 closing price for Bioverativ shares.

18. I understand that the Chief Legal Officer for Bioverativ has represented to a regulatory agency that on or about November 3, 2017, Sanofi delivered an unsolicited

bid to acquire Bioverativ for a definite price per share. At that point, Bioverativ began to contemplate selling.

Defendant(s)'s Suspicious Purchases

19. Defendant(s), who may be one or more foreign traders, purchased Bioverativ securities through one or more foreign accounts.

20. Based on data received from a regulatory agency, the Commission staff identified that Defendants' BIVV options trades were placed before the Announcement through an account at Credit Suisse (Switzerland), Ltd., a Zurich, Switzerland-based broker, and cleared through account 2HRNY0 (the "CS Omnibus Account") at Credit Suisse Securities (USA), LLC, a U.S. registered broker-dealer.

21. Based on data I received from a regulatory agency, I understand that from January 12, 2018, through January 19, 2018, Defendants purchased 1,610 call option contracts for Bioverativ stock, all of which were "out-of-the-money" at the time of purchase, having strike prices between \$65 and \$75 per share. All of the purchased options were set to expire on February 16, 2018. Attached hereto as **Exhibit 4** is a trade blotter for Bioverativ options trades placed through the CS Omnibus Account between January 12, 2018 and January 18, 2018. I received the information regarding the January 19, 2018 purchases through communications with an individual at the regulatory agency.

22. Specifically, Defendants purchased the following:

- a. On January 12, 2018, Defendants purchased 342 BIVV call option contracts with a strike price of \$65 at an average premium of \$2.44, 370 BIVV call option contracts with a strike price of \$70 at an average premium of \$0.79, and 100 BIVV call option contracts with a strike price of \$75 at an average premium of \$0.59;

- b. On January 16, 2018, Defendants purchased 3 additional BIVV call option contracts with a strike price of \$65 at an average premium of \$3.10 and 100 BIVV call option contracts with a strike price of \$75 at an average premium of \$0.80;
- c. On January 17, 2018, Defendants purchased 20 BIVV call option contracts with a strike price of \$65 at an average premium of \$2.29 and 100 BIVV call option contracts with a strike price of \$75 at an average premium of \$0.50;
- d. On January 18, 2018, Defendants purchased 300 BIVV call option contracts with a strike price of \$75 at an average premium of \$0.59; and
- e. On January 19, 2018, the last trading day before the Announcement, Defendants purchased 275 BIVV call option contracts with a strike price of \$75 at an average premium of \$0.56.

These purchases cost Defendants a total of \$170,081 (not accounting for fees). See

Exhibit 4.

23. According to data I received from a regulatory agency, Defendants' purchases made up a significant volume of all reported BIVV options trading on those days.
24. On January 12, 2018, a total of 4,303 trades in BIVV options contracts (of any type, call or put, and at any strike price) were reported. A set of option trades is reportable if, roughly speaking, they total 200 or more options on the same side of the market (e.g., purchases of call options and sales of put options are considered to be on the

same side of the market). Defendants' activity accounted for approximately 18.9% of all reported BIVV options trading on that day. I received total reported trading volume data during a phone call with an individual from a regulatory agency.

25. According to Bloomberg, on January 12, 2018, there were only 454 trades in \$65 BIVV call options, 448 trades in \$70 BIVV call options, and 104 trades in \$75 BIVV call options. Defendants' activity accounted for more than 75% of trades in \$65 BIVV call options, more than 82% of trades in \$70 BIVV call options, and more than 96% of trades in \$75 BIVV call options that day. Attached hereto as **Exhibit 5** is a Bloomberg screenshot showing trading volumes for \$65 BIVV call options on each day between January 8, 2018 and January 24, 2018. Attached hereto as **Exhibit 6** is a Bloomberg screenshot showing trading volumes for \$70 BIVV call options on each day between January 8, 2018 and January 24, 2018. Attached hereto as **Exhibit 7** is a Bloomberg screenshot showing trading volumes for \$75 BIVV call options on each day between January 8, 2018 and January 24, 2018.

26. On January 16, 2018, Defendants' activity accounted for 15.8% of the 650 BIVV options trades reported for that day. Moreover, according to Bloomberg, there were only 162 trades in \$65 BIVV call options and 103 trades in \$75 BIVV call options. Defendants' activity accounted for approximately 1.9% of trades in \$65 call BIVV options and more than 97% of trades in \$75 BIVV call options that day. See Exhibits 5 and 7.

27. On January 17, 2018, Defendants' activity accounted for 37.2% of the 323 BIVV options trades reported for that day. Moreover, according to Bloomberg, there were only 62 trades in \$65 BIVV call options and 105 trades in \$75 BIVV call options. Defendants' activity accounted for approximately 32.3% of trades in \$65 BIVV call

options and more than 95% of trades in \$75 BIVV call options that day. See Exhibits 5 and 7.

28. On January 18, 2018, Defendants' activity accounted for 61.6% of the 487 BIVV options trades reported for that day. Moreover, according to Bloomberg, there were only 300 trades in \$75 BIVV call options. Defendants' activity accounted for 100% of trades in \$75 BIVV call options that day. See Exhibit 7.

29. On January 19, 2018, Defendants' activity accounted for 14.1% of the 1,946 BIVV options trades reported for that day. Moreover, according to Bloomberg, there were only 545 trades in \$75 BIVV call options. Defendants' activity accounted for more than 50% of trades in \$75 BIVV call options that day. See Exhibit 7.

30. According to a regulatory agency, no other reportable trades in Bioverativ options had been placed through the CS Omnibus Account in the year leading up to the Announcement—by Defendants or anyone else.

The Effect of the Announcement and Defendants' Sales

31. As a result of the Announcement, Bioverativ's share price increased substantially. On Monday, January 22, 2018, Bioverativ shares opened at \$104.21, reached a high of \$104.30 for the day, and closed at \$103.79 per share, a 61.9% increase over its January 19 closing price. Attached hereto as **Exhibit 8** is a screenshot from MarketWatch.com showing the January 22, 2018, price data for Bioverativ shares.

32. Bioverativ had not closed at or above \$64.12 per share at any point since it began trading on the NASDAQ market in January 2017. Attached hereto as **Exhibit 9** is a Bloomberg screenshot showing historical price data for Bioverativ shares.

33. According to a regulatory agency, on January 22, 2018, Defendants sold 362 BIVV call option contracts with a strike price of \$65 at an average price of \$38.60

and 370 BIVV call option contracts with a strike price of \$70 at an average price of \$33.50. That is, Defendants sold all but 3 of their contracts with a \$65 strike price, and all of their contracts with a \$70 strike price. From these sales, Defendants received approximately \$2,636,820 in proceeds, for a net profit of approximately \$2,518,622.70 (assuming they retained the 3 most expensive contracts with a \$65 strike price).

34. According to a regulatory agency, on January 23, 2018, Defendants sold 75 call option contracts with a strike price of \$75. I expect these sales to have resulted in additional profits of approximately \$207,825, based on the last reported sale price for January 23 of \$28.30 and on a first-in-first-out basis.

35. I calculate that the realized profit of approximately \$2,726,447.70 from Defendants' January 22 and 23 sales is approximately 1603% of the total cost Defendants incurred to obtain all of the options contracts discussed above.

36. Trades in option contracts typically settle the day after they are executed. Accordingly, it is likely that the January 22, 2018, sales were settled, and funds were transferred to the Defendants' Swiss accounts, on January 23, 2018.

37. Based on conversations I had with counsel for Credit Suisse Securities (USA), LLC, I understand that some or all of the proceeds of the January 22, 2018, sales may have already been transferred to Switzerland.

38. As far as I have been able to determine from the data in my possession, Defendants retain 803 Bioverativ option contracts, which if sold at the last reported prices as of close-of-market January 24, 2018, would result in additional profits of approximately \$2,216,417.40.

39. I calculate that the total profit of approximately \$4,942,865.10 from Defendants' sold and unsold BIVV call options is approximately 2906% of the total cost Defendants incurred to obtain all of the options contracts discussed above.

40. The Commission has thus far been unable to determine the identity of those responsible for the trades at issue in this matter.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: January 25, 2018



Michael D. Hoke